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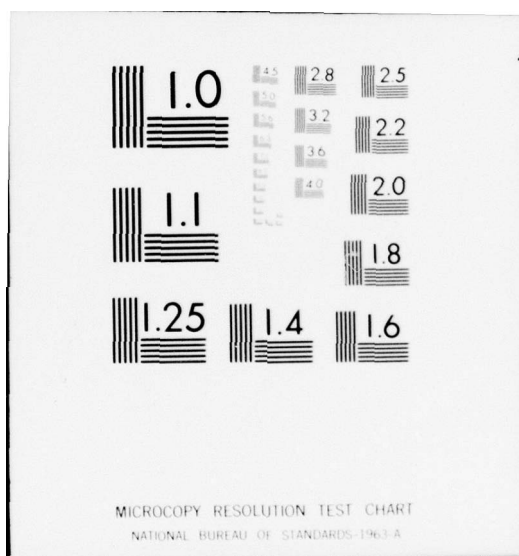
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DEFENSE SYSTEMS MANAGEMENT COLLEGE



PROGRAM MANAGEMENT COURSE INDIVIDUAL STUDY PROGRAM

TWO-STEP FORMAL ADVERTISEMENT
(AN EXAMINATION)

STUDY PROJECT REPORT
PMC 76-2

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REPORT DOCUMENTATION PAGE		READ INSTRUCTIONS BEFORE COMPLETING FORM
1. REPORT NUMBER 6	2. GOVT ACCESSION NO.	3. RECIPIENT'S CATALOG NUMBER 1
4. TITLE (and Subtitle) TWO-STEP FORMAL ADVERTISEMENT: AN EXAMINATION,		5. TYPE OF REPORT & PERIOD COVERED Student Project Report, 76-2
7. AUTHOR(s) JACK W. WOODS		8. CONTRACT OR GRANT NUMBER(s) 12 41p
9. PERFORMING ORGANIZATION NAME AND ADDRESS DEFENSE SYSTEMS MANAGEMENT COLLEGE FT. BELVOIR, VA 22060		10. PROGRAM ELEMENT, PROJECT, TASK AREA & WORK UNIT NUMBERS
11. CONTROLLING OFFICE NAME AND ADDRESS DEFENSE SYSTEMS MANAGEMENT COLLEGE FT. BELVOIR, VA 22060		12. REPORT DATE 76-2
14. MONITORING AGENCY NAME & ADDRESS (if different from Controlling Office)		13. NUMBER OF PAGES 37
		15. SECURITY CLASS. (of this report) UNCLASSIFIED
16. DISTRIBUTION STATEMENT (of this Report) UNLIMITED		15a. DECLASSIFICATION/DOWNGRADING SCHEDULE
17. DISTRIBUTION STATEMENT (of the abstract entered in Block 20, if different from Report)		
18. SUPPLEMENTARY NOTES SEE ATTACHED SHEET		
19. KEY WORDS (Continue on reverse side if necessary and identify by block number) SEE ATTACHED SHEET		
20. ABSTRACT (Continue on reverse side if necessary and identify by block number)		

DEFENSE SYSTEMS MANAGEMENT COLLEGE

STUDY TITLE: TWO-STEP FORMAL ADVERTISEMENT: AN EXAMINATION

STUDY PROJECT GOALS:

To provide an analysis of how and when Two-Step Formal Advertisement should be used in the material acquisition process.

STUDY REPORT ABSTRACT:

The purpose of this report is to examine the potential application of the Two-Step Formal Advertisement method of procurement. Emphasis is placed on the events which led to the creation of this type of procurement and how the Comptroller General has interpreted the regulation governing its use.

Two-Step Formal Advertising is a method of procurement designed to take advantage of negotiation flexibility and at the same time obtain the benefits of formal advertising. It is used where the specifications are not sufficiently definite or may be too restrictive to permit full and free competition without technical evaluation and candid discussion with the contractors about the technical aspects of the requirement.

The report does not intend to provide any legal advice as to when this approach should be used. It merely sets forth information upon which a Program Manager and Contracting Officer can base a decision as to the appropriateness of Two-Step Formal Advertisement for his/her particular program.

SUBJECT DESCRIPTION: Two-Step Advertisement
Two-Step Procurement

NAME, RANK, SERVICE
JACK W. WOODS, MAJ, USA

CLASS
PMC 76-2

DATE
OCTOBER 1976

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TWO-STEP FORMAL ADVERTISEMENT
(AN EXAMINATION)

Study Project Report
Individual Study Program

Defense Systems Management College
Program Management Course
Class 76-2

by

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MAJ USA

October 1976

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This study project report represents the views, conclusions and recommendations of the author and does not necessarily reflect the official opinion of the Defense Systems Management College of the Department of Defense.

EXECUTIVE SUMMARY

This report examines the potential application of the Two-Step Formal Advertisement method of procurement in the material acquisition process. Emphasis is placed on the intent and application (as ruled by the Comptroller General) for this type of procurement.

This method of procurement combines some of the advantages and latitudes of negotiation with the element of disciplined price competition in formal advertisement; however, certain conditions must be present to permit its use and special provisions are provided for its execution. A proper understanding of its intent as ruled by the Comptroller General will better enable a proper application of this type of procurement in the material acquisition process.

Two-Step Formal Advertising is a method of procurement designed to take advantage of negotiation flexibility and at the same time obtain the benefits of formal advertising. It is used where the specifications are not sufficiently definite or may be too restrictive to permit full and free competition without technical evaluation and candid discussion with the contractors about the technical aspects of the requirement.

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SECTION I

INTRODUCTION

Purpose of the Study Project

Ask twenty different Contracting Officers (Government or Industry) to explain the intent and procedure for procurement by the Two-Step Formal Advertisement method and you will get thirty different answers (the thirty is not a mistake, some Contracting Officers will give you two or three completely different opinions in the course of a five minute conversation.) This points up one of the biggest problems in the use of Two-Step Formal Advertisement -- many people do not understand how and when to use it. This problem is highlighted by a remark made by Mr. Ralph C. Nash, Jr., Associate Dean and Professor of Law at George Washington University, over a decade after the Comptroller General held that Two-Step Formal Advertisement is a valid and legal method of procurement and that the use of this method of procurement tended to maximize competition.¹ Mr. Nash described Two-Step Formal Advertisement as follows: "Another permissible method of limiting competition is the recently developed procedure of Two-Step Formal Advertisement."² Although the benefits of Two-Step Formal Advertisement

¹40 Comptroller General Decision 40.

²Ralph C. Nash, Jr., and John Cibinic, Jr., Federal Procurement Law, (2nd ed.; Washington, D.C.: The George Washington University, 1969), p. 239.

are "in the eyes of the beholder," I believe a general understanding of the intent and procedures of this type of procurement will provide for a better application of it in the Material Acquisition Process.

The purpose of this paper is to examine the Two-Step Formal Advertisement method of procurement to determine when and how it can be used in the material acquisition process. Specifically this research paper will summarize the history, applicability and procedure of Two-Step procurement. The research consists of a review of the pertinent literature, regulations, and Comptroller General decisions on the subject.

SECTION II

HISTORY

General

In 1792 Congress stipulated that supplies for the War Department would be purchased by the Treasury Department. The first Federal statute requiring advertisement for bids appeared in 1809. This statute was very ambiguous; however, subsequent statutes developed specific ground rules for advertising Government Procurements. In 1860 a statute combining the previous statutes governing procurement was passed and later incorporated in Section 3709 Revised Statutes. This revised statute required advertisement with only two exceptions: contracts for personal services and contracts to be awarded when public emergencies necessitated immediate performance. With certain exceptions, this revised statute continued to regulate the placement of military contracts until World War II.

On 27 December 1941, less than two weeks after Pearl Harbor, Executive Order 9001 implementing the First War Power Act was passed by Congress. This Executive Order authorized agencies connected with the war effort to enter into contracts without regard to existing provisions of law, whenever such action would facilitate prosecution of the war effort. Since procurement personnel were so indoctrinated with the habit of Formal Advertisement, the Chairman of the War Production Board prohibited any contracting by formal advertising unless

it was specially authorized. Thus, the majority of military procurement for the remainder of the war was by negotiations under the authority of Title II of the First War power Act.¹

After World War II, the President asked Congress to study the procurement situation and to try to derive a method of procurement which would assure maximum efficiency for the Federal Government both in price and in timely delivery. The Senate Committee on Armed Services stated in their report that the purpose of the bill which was to result from their study was as follows:

This bill, as amended provides for a return to normal purchasing procedure through the advertising-bid method on the part of the armed services, namely, the War Department, the Navy Department and the U.S. Coast Guard. It capitalizes on the lesson learned during wartime purchasing and provides authority in certain specific and limited categories for the negotiation of contracts without advertising. It restates the rules governing advertising and making awards as well as fixing the types of contract that can be made.

Eventually this bill was enacted as the Armed Services Procurement Act of 1947.²

The present law, Chapter 137 of Title 10, United States Code, which codified the Armed Service Procurement Act of 1947, requires DOD contracts for property or services to be formally advertised except in 17 specific situations where negotiations may be used.

¹ John E. O'Brien, Adjutant Professor at Florida Institute of Technology, Melbourne, Florida, September 30, 1971, Class lecture notes in CM 511, "Contract Administration."

² Ibid.

Creation of Two-Step

Starting early in the history of Federal procurement, it was realized that both formal advertisement and negotiations offered advantages and disadvantages to our procurement system. Depending upon the circumstances for each specific situation, it had to be determined which method would best satisfy both the objective of Congress (to ensure a fair and reasonable price) and the objective of the procurement activity (to provide adequate supplies and service in substantial quantity to the requiring activities).

Since all procurement situations do not fall neatly into one of the methods provided by the Armed Service Procurement Act of 1947, an approach to procurement was developed which tried to blend together the advantages offered in both methods. This method of procurement was to be performed in two distinct steps; thus, it acquired the name Two-Step Formal Advertisement (two-step).

Basically this method of procurement is conducted in the following manner. In the first step, the Government solicitates potential contractors to submit and if necessary discuss a technical proposal without submitting a price. This step provides the Government with a chance to determine the acceptability of the supplies or services offered. The second step is a formally advertised procurement confined to the offerors who have submitted acceptable proposals in the first

step. This step differs from normal formal advertisement in that each bidder submits a bid on his own technical proposal.

Thus, two-step procurement provides a "bridge" between the two basic approaches to procurement. It combines the latitude and freedom of free enterprise negotiations in the first step with the strict discipline of competitive pricing as established by the market place and achieved through formal advertising in the second step.

SECTION III

APPLICABILITY

Authority

The authority to conduct two-step procurement was promulgated at the suggestion and recommendation of the Subcommittee for Special Investigation of the House Armed Service Committee in a report on the Study of the Armed Service Procurement Act, June 15, 1957, p. 65. This report stated that the determination of the acceptability of technical proposals is vested in the procurement officials who are best qualified to evaluate them. It further stated that the responsibility for determining the needs of the Government and whether technical proposals meet the Government's requirements is vested in the procurement agencies alone.¹

In 1956 the Comptroller General held that it was proper for a procurement agency to issue a procurement restricting acceptable bids to manufacturers who had previously qualified their products. In making this decision, the comptroller General stated the following:

..."It is recognized that the desirability of full publicity must be qualified by the circumstances surrounding the individual case,

¹40 Comptroller General Decision 35.

and that effect must be given to 'bona fide' administrative determination that the urgency of a particular procurement program are such that the delay involved in obtaining maximum competition would adversely affect the Government's interest."¹

Using the two foregoing citations, the Comptroller General stated that it was proper for an agency to use Two-Step Formal Advertisement as long as the request for a proposal was very careful to spell out the procedures which would be used to determine the successful bidder.²

In reaching this decision he also stated that to the extent that the technical proposal is approved in the first step and at a latter time it is determined that the technical proposal does not meet the Government's specifications, the Government's specifications will prevail and the contractor must modify his proposal in accordance or be declared non-responsive.³

In another decision the Comptroller General stated that if a technical proposal was determined to be unacceptable, any bid made by the company under the second-step invitation of bid which required performance in accordance with the performance specifications and the acceptability

¹ 36 Comptroller General Decision 809.

² 40 Comptroller General Decision 40.

³ Ibid.

of the technical proposal approval in the first step would not be responsive unless so approved.¹

At the present time the regulations governing Two-Step Formal Advertisement are set out in Section II, Part 5 of the Armed Service Procurement Regulation.

¹40 Comptroller General Decision 514.

Purpose

The two-step method of procurement tries to promote the maximum effective competition possible when specifications or designs are not definite enough to proceed with formal advertisement. This is accomplished by requiring prospective bidders to submit their technical proposal for satisfying the Government's requirements, without pricing, to determine the acceptability of what the bidder is offering. These technical proposals are then evaluated by the Government to determine if they meet the Government's requirement. If the technical proposals are not clear as to the original intent or to the means of producing the item, the bidder may be asked through discussions what might be done to improve the item or process thereby clarifying the proposal to both the bidder and the Government.

The objective of two-step is to permit the development of a statement of the Government's requirements which is sufficiently descriptive and not unduly restrictive. Thus, the contracting officer must work very closely with the Government's technical personnel to ensure that the performance requirements in the request for proposal are not too restrictive.¹

¹ASPR 2-501.

Conditions Necessary For Its Use

Determining when it is practical to use the two-step method of procurement is very difficult. In general terms, the two-step method should be used when the technical data is too incomplete for a requirement for formal advertising; however, the technical evaluation is available for comparison and the government is assured of having two or more responsive and responsible bidders.

As has been suggested, two-step formal advertising is not called for in all military procurements. It should be used when all of the following conditions are met:

1. When it is not possible to make the specifications or purchase description sufficiently definitive to ensure full and free competition without a technical evaluation of the potential contractors proposals.
2. When definite criteria have been established for evaluating the technical proposals.
3. When more than one technically qualified source is expected to submit proposals.
4. When a firm fixed-price contract will be issued (with or without escalation).
5. When enough time will be available to use the two-step method.¹

The use of two-step procurement is not precluded by any one of the following conditions:

¹
ASPR 2-502 (a).

1. A multi-year procurement is being made.
2. A first or subsequent production quantity is being procured under a performance specification.
3. Government-owned facilities or special tooling is to be made available to the successful bidder.
4. A total small business set aside is involved.¹

In evaluating the above criteria to determine the feasibility of the use of Two-Step Formal Advertisement, the primary objective must not be overlooked and that is to promote the maximum effective competition when specifications are not definite enough to permit the use of formal advertisement.

¹ ASPR 2-502 (b).

SECTION IV

PROCEDURE

General

As its name implies, two-step procurement will be conducted in two steps, each being clearly defined and distinct from the other. The following general rules govern procedure for procurement through Two-Step Formal Advertisement:

- (1) The use of Two-Step Formal Advertisement must be approved at a level higher than that of the Contracting Officer.
- (2) Invitations for bids are issued only to the sources whose technical proposals have been evaluated and determined to be acceptable under step one.
- (3) All other procedures for evaluation and award must be in accordance with Section II of the Armed Services Procurement Regulation.
- (4) To be responsive, a bid must conform, in all material respects.
- (5) A late bid can be considered for award only if it is received before award and acceptance is authorized by one of the circumstances set forth in ASPR 2-303.

- (6) Only the potential contractor whose technical proposals were acceptable after step one can be solicited in step two for price quotation.
- (7) The low bid in step two must be accepted even though another bidder's proposal may appear more desirable at a very slightly higher bid price.

STEP ONE

Solicitation

After determining that the present procurement situation lends itself to the two-step procurement method, the Contracting Officer will send a request for technical proposals to qualified sources of suppliers in accordance with ASPR 1-302.2. This request may take the form of a letter and should contain all the information essential to provide guidelines for the submission of the proposals.

It must state that the technical proposals will not include prices or pricing information and it will contain notification of the procurement in two steps. The criteria to be used in evaluating the technical proposal will be spelled out. In addition, the request will be synopsisized in the "Commerce Business Daily".¹

The time of submission of the first step proposals will be strictly adhered to unless waived by the Government. The Comptroller General has held that the time limit placed on the submission of the first-step proposal is for the benefit of the Government and may be waived in an appropriate case, provided that this does not prejudice the rights of others who have submitted proposals.²

¹ ASPR 2-503.1(a).

² Comptroller General Decision E-160324 (16 February 1967), Government Contracts Report, Volume 2, para 3705.541.

Although the Comptroller General has provided flexibility in the acceptance of late proposals, he has cautioned the procurement agencies not to abuse this privilege. This advice was given in a case where the two step advertisement stated that any first step technical proposals submitted by mail and received after a specified date would not be considered for award unless (1) they were sent by registered or certified mail, and (2) the lateness was due solely to delay in the mail for which the offeror was not responsible. Although the late proposals of two offerors did not meet either of these tests, the procurement agency nevertheless considered them--relying on several prior Comptroller General decisions which indicated the late bid could be considered in the first step of a two step procurement. One of the competing firms objected to the consideration of the late proposals since the solicitation expressly stated that late bids would not be considered. In deciding this case, the Comptroller General ruled that the agency's interpretations of his prior decision was reasonable; however, he advised the procuring agency that (1) future solicitations should appropriately advise offerors of the rules which the agency would apply to late first step proposals, and (2) such late proposals should be treated in strict accordance with the solicitation's terms (and any prior contrary Comptroller General decisions are hereby modified accordingly).¹

¹Comptroller General Decision B-177284 (19 April 1973), The Government Contractor, Vol. 15, para. 173.

A statement will be contained in the request telling prospective bidders that in the second step of the procurement only those bidders whose technical proposals are determined to be acceptable initially or as a result of subsequent discussions will be considered for final award. In addition, each bid in the second-step must be based upon the bidder's own technical proposals.¹

The language used in the request should place the contractor on notice that proposals submitted should be sufficient, without additional explanation or information, for the Government to make a final determination as to the acceptability or unacceptability of the proposal based upon the data submitted. The Comptroller General has held that a contractor's proposal was unacceptable when he relied on a prototype model designed and manufactured under a prior specification and did not submit sufficient data for a determination that his present proposal did meet the new requirements.² Since step one of a two-step procurement is a qualifying and not competitive phase, contracting agencies should make reasonable effort to bring step one proposals to acceptable status, thereby increasing competition, rather than immediately classifying proposals as unacceptable.³

¹ ASPR 2-503.1 (a).

² 40 Comptroller General Decision 40.

³ Comptroller Decision P-183664 (15 July 1975), 75-2 CPD 39.

A statement in the request will tell the prospective bidder that only one technical proposal may be submitted by each offeror, or that multiple technical proposals may be submitted. When the latitude of specification permits the utilization of essentially different technical approaches, it is generally in the best interest of the Government to authorize the submission of multiple proposals. When multiple proposals are authorized, each technical proposal presenting a different basic approach is evaluated and the offeror is notified as to its acceptability.¹

The Comptroller General has held that not only multiple proposals may be submitted but that "alternates" may be offered, e.g., on different types of equipment in lieu of those offered as recommended choices. If the Government approves such a proposal in the first step, the bidders may (in the second step) include alternate prices on such items without making his bid an improper alternate bid. Moreover, in such a case the Government may choose to ignore the alternate items and may award the contract on the bidders' basic bid.²

A request for technical proposals may contain a statement indicating what the Government's probable delivery schedule or performance requirement will be although these items are not evaluated in step-one. This information may be of assistance to potential bidders when determining whether or not they should submit a technical proposal. The statement should also advise the bidders that such information is not binding upon

¹ ASPR 2-503.1 (a) (x).

² 40 Comptroller General Decision 807.

the Government and that the Government's actual delivery schedule or performance requirements will be contained in the formal advertisement for bids issued under step two of the procurement process.¹

Upon the receipt of the technical proposals every precaution will be taken to safeguard the proposals to preclude disclosure to unauthorized persons. When the technical proposal contains data such as technical design or concept or financial and management plans which the proposer desires to remain undisclosed to the public, it will be so marked and accepted and handled in accordance with procedures for treatment of procurement information. In addition, any reference to price or cost will be removed.²

¹ASPR 2-503.2 (b).

²ASPR 2-503.2 (e).

Evaluation

Depending upon the number of proposals received and the complexity of the end item, the Contracting Officer will establish a time period within which the technical proposals will be evaluated. It is essential that the evaluation of the technical proposal be completed expeditiously; however, it is necessary that all personnel concerned with the procurements, as well as any subsequent discussion with the sources submitting the technical proposals be included in the evaluation.

The technical evaluation of the proposals will be based upon the criteria as outlined in the Request for Technical Proposal. The decision as to the acceptability of a technical proposal submitted under step one of a two-step procurement is a matter requiring judgement and expertise of technically qualified personnel; thus, the procurement agency's decision will not be questioned where it is not clearly shown to be erroneous or arbitrary.¹

In a procurement of helicopters the request for technical proposals required bidders to submit for testing the helicopter generally described in their proposals and permitted corrections of any "minor" deficiencies revealed thereby--but the request did not define what was meant by "minor." After such testing one firm proposed to make certain modifications, which the Government technicians believed introduced only a "minor" degree of technical risk and did not create any reasonable doubt that the

¹ Comptroller General Decision, B-157705 (29 March 1966), Government Contracts Report, Vol. 2, para. 3705.79.

firm's proposal could be achieved--even though "ordinarily" they would "not" be considered "minor" modifications by those schooled in the helicopter art. The Comptroller General rejected a protest by an unsuccessful competitor who cited decisions stressing the need for bids to respond fully to invitation requirements so as to ensure that the contract awarded is the same offered to all bidders. The Comptroller General said that this strict requirement did not necessarily apply to the first step of a two-step procurement which contemplated discussion and evaluation and which was more akin to "negotiation" than to formal advertising.¹

The current policy provided that proposals as submitted will fall within one of three categories:

(1) Acceptable.

(2) Reasonably susceptible of being made acceptable by additional information clarifying or supplementing but not basically changing the proposal as submitted.

(3) Unacceptable. Any proposal which modifies or fails to conform to the essential requirements or specifications of the request for technical proposals will be considered nonresponsive and will fall under this category as being unacceptable.²

¹ Comptroller General Decision, B-163767 (5 August 1966), The Government Contractor, Vol. 9, para. 406.

² ASPR 2-503.1 (e).

Determination

In determining which class a proposal would fall into, the Government is not required to "initiate" efforts to clarify a proposal which is "materially deficient." If however, the proposal is a "Marginal" one and it appears that reasonable effort to obtain clarification or additional information might bring it to an acceptable status, such effort should ordinarily be made.¹

However, a proposal need not necessarily be rejected simply because it does not meet the Government's requirements in all respects. The Comptroller General has held that in the absence of a determination that an unacceptable proposal cannot readily be made acceptable, the Contracting Officer is obligated to communicate with the bidder and attempt to obtain an acceptable proposal.²

The Government is permitted to make material changes in its requirements and then permit a bidder to revise his proposal to meet the new requirements even though (a) the bidder's first proposal was unacceptable, and (b) the suggestions for revision were obtained from a competitor's proposal. This should be done before informing the bidder that his proposal is unacceptable. It should not be done if it involves the disclosure of any confidential or proprietary information.³

¹ Comptroller General Decision, B-155433 (17 June 1965), The Government Contractor, Vol. 7, para. 321.

² Comptroller General Decision, B-153195 (6 February 1964), Government Contracts Report, Vol. 2, para. 3705.79.

³ Comptroller General Decision, B-157827 (7 February 1966), Government Contracts Report, Vol. 2, para. 3710.745.

Generally, the Government's determination that a first-step proposal is unacceptable is final and the Government should refuse to consider uninvited amendments to such a proposal submitted after the date set for receipt of proposals. But in one case, where the facts were such that the Government should have placed the proposal in category "(ii)" and furthermore delayed unreasonably in notifying the bidder that his proposal was unacceptable and why, the bidder was allowed to amend his proposal so as to make it acceptable and was then allowed to submit a second-step bid and receive the contract as the low bidder.¹

The Contracting Officer usually will request bidders which have submitted reasonably susceptible technical proposals to submit additional information. The Contracting Officer may obtain this information by written amendments to the proposal or he may arrange discussions for this purpose. When he receives the additional information, it will be incorporated into the bidders original proposal. The time limitation for this information may be extended at the discretion of the Contracting Officer. If the additional information that is submitted modifies or fails to conform to the essential requirements or specifications of the Request for Technical Proposals, it will be considered nonresponsive and categorized as unacceptable.

¹43 Comptroller General Decision 255.

If a final determination is made that a technical proposal is unacceptable, the Contracting Officer must promptly notify the source submitting the proposal of this fact. The notification will state that proposal or revision to the proposal will not be considered and will indicate in general terms the basis for the final determination.

Late technical proposals will be considered and governed by the procedures established for late proposals and modifications. If the Secretary concerned determines that the consideration of a late proposal is of extreme importance to the Government, then the Contracting Officer may resolicit all firms (including the late offerors) which have submitted proposals and are determined to be capable of meeting current requirements. Such resolicitation will specify a date for submission of new proposals and shall include the "Late Technical Proposals" revision of ASPR 2-503.1 (a) (1).

By placing all technical proposals submitted in step-one into one of the three categories for technical acceptability, a more stringent control over the quality of the contractors' proposals is provided. When the Contracting Officer determines that there are sufficient technical proposals in the acceptable category so as to assure adequate price competition under Step-Two without expending further time, effort, and delay, he may proceed directly with Step-Two.

If it becomes apparent that it is necessary to discontinue Two-Step Formal Advertising as a result of the technical proposals, a statement setting forth all the facts and circumstances will be made a part of the contract file. Each source submitting a technical proposal will be notified in writing of the discontinuance and the reason therefore. If step one results in only one or no acceptable technical proposals, the procurement may be continued under the provisions of 10 U.S.C. 2304 (a) (10), "Supplies or Services for Where It Is Impracticable to secure Competition by Formal Advertising," unless "Small Business Restricted Advertising" has been used.

In summary, the Comptroller General has generally held that the determination of whether a technical proposal meets the procurement agency's needs as is or can easily be modified to do so falls within the discretionary authority of the Contracting Officer and is not subject to court review. The determination as to whether or not adequate price competition is present to enter into step two is also the discretionary judgement of the Contracting Officer based upon the policies of the procurement agency. The provision, for adequate price competition in the ASPR is designed to obtain a number of different technical proposals which will achieve the desired competitive price for the Government.

STEP TWO

Solicitation

Once the Contracting Officer makes his determination that adequate price competition will exist in step-two, a formally advertised procurement will be conducted in accordance with the applicable provision of the ASPR on formal advertisement. However, an exception to the general procedures is that the Invitation for Bids will be issued only to those sources whose technical proposals have been fully evaluated and have been determined to be acceptable under step one.

If the bidder has proposed multiple acceptable proposals or an acceptable "alternate" proposal, he will be afforded the right to place a separate bid on each acceptable proposal.³⁹ Although each bid would be considered on its own merit, true competition would not exist in step two if only three responses were received and all three were from the same contractor. Thus it can be stated that the solicitation of the formal advertised portion of this type of procurement is based upon the Government performance specification as modified by each acceptable technical proposal of each prospective contractor.

The Invitation for Bids will not be synopsisized in the "Commerce Business Daily" or publicly posted. However, the names of the firms which have submitted acceptable technical proposals in step one will be listed in the "Commerce Business Daily" for the benefit of prospective subcontractors.¹ In addition to the direct benefits to the prospective

¹ ASPR 2-503.2 (iv).

subcontractors the procurement agency will probably receive a lower price because of the additional competition that will be generated for the prime contractor.

Evaluation

The process of determining whether a bidder's offer meets the requirements of the Invitation, both as to what is offered and as to the contractual terms as well, is often a very difficult job. This process is the same as that used in the conventional Formal Advertisement process.

During evaluation, the Contracting Officer may be faced with the necessity of eliminating some bids from consideration or even in some circumstances of rejecting all bids and readvertising the procurement. Ordinarily, any bid which does not conform in every respect to the essential requirements of the Invitation for Bids is rejected.

Normally when the Government gives its acceptance of a first-step proposal it carries with it an implication that it is "technically feasible." However, it is not a binding commitment that articles made according to the proposal will meet the stated end requirements. Ordinarily it is the responsibility of the contractor, at his own expense to make any necessary changes to adapt the proposal to these requirements.

In an illustrative case a Government-furnished compressor for a mobile air conditioner was not designed for belt-driven applications which is how the contractor proposed to use it. Although the contractor

was unable to get any information on the configuration of the compressor from the manufacturer, he never requested any information from the Government. In this case, the Comptroller General first ruled that the contractor was not entitled to any increased compensation for changes to the contract which were necessary to solve the problem.¹ Further inquiry, however, disclosed that the Air Force was on notice that the bidder's design might not be feasible; that the answer to the problem was readily available to the Air Force but not to the bidder, that this was "tantamount to actual knowledge;" and that the bidder had emphasized the crucial importance of his design drawings, indicating an intent to limit his responsibility for design modifications. On reconsideration, the Comptroller General allowed the increased compensation.²

¹ Comptroller General Decision, B-162538 (15 August 1968), The Government Contractor, vol. 10, para. 380.

² Comptroller General Decision, B-162538 (13 January 1969), The Government Contractor, Vol. 11, para. 115.

Award

To be eligible for award of a contract any bidder whose bid has been determined to be responsive to the Invitations must, also, be determined to be a responsible contractor. This means that the Contracting Officers must establish that the prospective contractor is a manufacturer or regular dealer in the supplies sought; that he has adequate financial resources; that he can comply with the delivery schedule; that he has a satisfactory record of prior performance and integrity; and is otherwise qualified and eligible to receive an award under applicable laws and regulations.

Finally, the Contracting Officer must determine which bid actually offers the Government the lowest price. To do this, he must take into account the actual prices bid and additional factors such as offered discounts, price escalation provisions, transportation costs, and any other. Award of a contract will be made to the lowest responsive and responsible bidder who meets the above evaluation, whose bid conforms to the essential provisions of the Invitation for Bids, and whose price is found to be fair and reasonable.

During the second step the same strict rules which apply to any other formal advertised contract are followed. The sealed bids are opened publicly. A bidder may modify his bid after opening of the bid if the modification is in the interest of the Government and is not prejudice to other bidders. For example, when the low bidder offers to reduce his price, the modification may be accepted.

When it is in the interest of the Government, the Contracting Officers may waive minor informalities in bids which:

1. Do not affect the price, quality, etc., of the articles to be furnished, and
2. Do not prejudice the rights of other bidders.

In such cases the preferred procedure, time permitting, is to allow the bidders the right to correct the informality or irregularities which may be waived.¹

The bids must conform to the advertised specifications in order to be acceptable. If the mistake results in a material deviation from the specification or the contractor's acceptable proposal in step one, it is unresponsive and cannot under any circumstances be corrected--it must be rejected. If the mistake is not noticed before award and the contract is awarded to a bidder with the mistake, a binding contract is formed and the contractor must bear the consequence of his mistake. The general rule is not applicable where the Contracting Officer has actual notice or constructive notice of the probability of an error prior to accepting the contractor's bid. In such a circumstance acceptance does not result in a binding contract and the contractor will be relieved from performance or allowed a price adjustment.

All bids may be rejected when it is in the public interest to do so. However, the Comptroller General strongly objects to rejections of all bids when he believes there is an abuse of administrative discretion.

¹ Government Contracts Guide (Chicago, Illinois: Commerce Clearing House, Inc., 1959), para. 742.

The controlling consideration seems to be whether or not, by readvertising, the Government may reasonably expect to receive bids substantially more advantageous.

The Contracting Officer must consider all protests or objections to the award of a contract, whether submitted before or after award. If award has not been made, he may require that written confirmation of an oral protest be submitted by a specific time. If the written protest is not received by the time specified, the oral protest may be disregarded and award made in the normal manner, unless he finds upon investigation that remedied action is required. If a written protest against the making of an award is received, award should not be made until the matter is resolved, unless the Contracting Officer determines that:

1. The items to be procured are urgently required;
2. Delivery of performance will be unduly delayed by failure to make award promptly; or
3. A prompt award will otherwise be advantageous to the Government.

If the Contracting Officer decides that an immediate award is necessary he must document his files accordingly and notify the protester of his decision to award the contract. A protest after award must be handled accordance with department procedures.¹

Contracts awarded after formal advertisement in the second step shall be on a firm fixed-price type, except that fixed price contracts with escalation may be used where flexibility is necessary and feasible.

¹Government Contracts Guide (Chicago, Illinois: Commerce Clearing House, Inc., 1959), para. 6074.

Thus, we have seen that in the second-step of a Two-Step Formally Advertised Procurement, the procedures are a substantial and complex process involving considerable administration expense. All these steps must be taken in every purchase. It suffices to say that it is an intricate system which attempts to secure the best results for the Government by the use of wide-spread competition. Great emphasis must be and is placed on maintaining the integrity of the system of formal advertisement in the second step of Two-Step Formal Advertisement.

Summary

Two-Step Formal Advertising is a method of procurement which is designed to expand the use and obtain the benefits of formal advertising where it is otherwise impractical to do so because of inadequate specifications or design. Thus, it tends to "bridge the gap" between negotiated procurements on one hand and formally advertised procurements on the other. It combines some of the advantages and latitudes of the former methods with the element of disciplined price competition within the other.

Some of the benefits that can be derived by the use of the two-step method are:

1. A price established by the market place.
2. A broader base upon which industry can compete.
3. Acquire the benefit of industry's knowledge:
 - a. to develop a technical specification for a performance specification.
 - b. to update existing specifications.
4. Reduce Government contract and administration costs during contract performance.

As can be seen all of the above benefits would result in a cost reduction to the Government, when considering the "total" cost of an item.

However, as has been pointed out not all procurements lend themselves to the two-step method. To be eligible a procurement must meet the criteria set forth in ASPR 2-502 (a). If it is determined that the procurement meets the above criteria, the ability of the Government Contracting Officer to properly plan the procurement will determine the success or failure of the Two-Step Formal Advertised Method.

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